JUL 8 2003

No. 02-1674

In The
Supreme Court of the United States

MITCH MCCONNELL, et al.,

Appellants,

v.

FEDERAL ELECTION COMMISSION, et al.,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

BRIEF *AMICI CURIAE* OF THE STATES OF VIRGINIA, NORTH DAKOTA, IDAHO, INDIANA, KANSAS, NEBRASKA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, AND UTAH IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Do the restrictions imposed upon state and local parties and elections by Title I of the Bipartisan Campaign Reform Act of 2002 ("BCRA") violate Article I, Section 4 of the U.S. Constitution, the Tenth Amendment, and principles of federalism?

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amici are States which through our Attorneys General argue BCRA is an unconstitutional intrusion upon state sovereignty. While the Federal Elections Clause, U.S. Const. art. I, § 4, cl. 1, gives the Federal Government broad authority to regulate federal elections, it provides no authority for Congress to regulate state election activity. When BCRA took effect, many state campaign finance laws were overridden. This is even true for amicus Commonwealth of Virginia, which is conducting its state elections *this* November in a non-federal election year.

Filing this brief is necessary because the lower panel neglected the Plaintiffs' threshold Elections Clause and Tenth Amendment arguments. Basing their decisions primarily on the First Amendment, Judges Leon and Henderson did not confront Plaintiffs' federalism claims. Judge Kollar-Kotelly avoided the issue by finding none of the Plaintiffs had standing to raise the argument.[2]

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[1] This brief was not written in whole or in part by counsel for a party. The preparation of this brief was funded by the State Government Leadership Foundation, a 501(c)(4) organization whose membership includes present and former elected state officials of the amici States.

[2] With respect to §§ 301(20)(A)(i), (ii), and (iv), Judge Leon admitted it is a "considerable issue" whether the Elections Clause can be fairly read to allow Congress to regulate state party matters. Leon at 1119sa-1120sa. But he also skipped the federalism challenges to Section 301(20)(A)(iii) without explanation. Leon at 1126sa, n.63. Opinions for *McConnell v. Federal Election Comm'n*, No. 02-582, 2003 U.S. Dist. LEXIS 7834 (D.D.C. May 1, 2003), reprinted in Joint Supplemental Appendix to Jurisdictional Statements, cited herein as [Name of Judge] at 1-1400sa.

Amici are well-informed to bring to the Court's attention the overreach of BCRA and its federalization of state and local campaign finance law. States have responsibility for conducting state elections and have adopted their own campaign finance rules reflecting the different choices of our citizenries. As always, amici are vigilant in ensuring the Federal Government does not exceed its limited Constitutional authority; we submit this brief to defend our unique interest.

AUTHORITY TO FILE

This brief is presented on behalf of amici States by their Attorneys General pursuant to Court Rule 37.4.

SUMMARY OF ARGUMENT

Our Federal government is one of limited powers. The judiciary, a branch with tenure and authority independent of direct electoral control, must often keep Congress' political zest from running beyond its actual legislative power. One limitation on Congress is a result of the war our forefathers fought over the abuses of sovereignty. Their victory created the constitutional principle of federalism to protect the people and the States from being overrun by a national government, as the colonies were.

Title I of BCRA violates that principle. The offense occurs in the most fundamental area of a democratic system: a State's ability to have its own rules on how its own government will be chosen. Congress' transgression occurs by trumping state campaign finance laws and is

similar to its prior over-reaching in *Oregon v. Mitchell*, 400 U.S. 112 (1970). This Court is called to prevent this violation by applying the Tenth Amendment or the Elections Clause in Article 1 of the U.S. Constitution.

Congress has asked this Court to vouchsafe its fears of corruption. It has even presented alternative statutes to the Court to help them find a political majority on how to clean up the system. This Court can avoid that thicket by finding state sovereignty – an idea older than contribution limits or the appearance of corruption – has been trespassed by Congressional over-regulation. Simply put, whatever problems Congress thinks it has with its elections cannot lawfully be solved by federalizing the rules Governors, state legislators and even some candidates for mayor must follow to get elected.

When Congress overruled the financing laws our constituents chose for electing their own state governments, it also took from them the power to shape what their state leaders do and how they will be held accountable. Do not take our word for it: Congressionally-elected campaign finance reformers insist that contributions, and not ideas, determine politics and legislative results. If they are right, then the Constitution must be invoked to prevent Congress from determining state politics and legislative results by reforming state campaign finance laws. And if they are wrong, then this entire artifice is in doubt.

Either way, Congress does not have the authority to overrule our campaign laws and their lack of deftness in doing so shows how fortunate it is they do not have that right.

ARGUMENT

This case combines two of the most lively debates in American history: campaign finance reform in the 107th Congress and the proper allocation of power among dual sovereigns in the Constitutional Convention. To reconcile these two, this Court must understand what non-federal ("soft") money really is and does, and how the new campaign finance reform law conflicts with the Framers' cherished federalism.

Political parties raise and spend non-federal money in two different places and ways. First is money raised (typically by national party committees, federal officeholders and candidates) and spent outside the contribution and expenditure definitions of federal election law. This money is kept by the national parties in a few large accounts in Washington and finances the national parties' administrative expenses, redistricting work, and a share of its federal candidate-related issue ads and voter contact expenses.[3]

Second is money raised (by just about anyone) and spent in specific compliance with the limits and definitions of a state's own election law. State parties raise this money and keep it in their own state accounts for making contributions to state candidates and to pay for voter contact expenses. National parties also raise this money to make state-regulated contributions to state candidates and transfers to state parties.

[3] Leon at 1214sa-1215sa (facts #60-64); Kollar-Kotelly at 533sa (fact #1.35).

BCRA regulates both. We are not challenging Congress' wisdom or ability to regulate federal money for the very reason Congress should not be allowed to regulate non-federal money; we each lack the power to regulate the other.

This Court has said Congress, not the States, has the authority to regulate federal campaign finance. *Buckley v. Valeo*, 424 U.S. 1, 13 (1976) (noting Congress' power to regulate federal elections is well-established). In fact, the Federal Election Campaign Act specifically preempts the States from regulating federal campaign finance.[4]

It follows that States have similar authority to regulate state campaign finance. To be sure, this Court recently sustained two state campaign finance laws not because they were compatible with Congress' rules (in fact, they were not) but because each State advanced its own interest well enough to pass First Amendment muster. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660, 666 (1990) ("[Michigan] has articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations . . . [and] Michigan's

[4] *See* 2 U.S.C. § 453 (1976) (amended 2002) (federal election laws "supersede and preempt any provision of State law with respect to election to Federal office"). According to the Conference Committee report on the 1974 Amendments to the Act, federal law controls with respect to campaign expenditure-related criminal sanctions; the sources of campaign funds used in federal races; reporting and disclosure of political contributions to, and expenditures by, federal candidates and political committees; and the conduct of federal campaigns – but does not affect the States' rights as to other election related conduct such as voter fraud; ballot theft; the manner of qualifying as a candidate; or the dates and places of elections. H.R. Rep. No. 93-1438, at 69, 100-101 (1974).

decision to exclude unincorporated labor unions from the [prohibition] is therefore justified by the crucial differences between unions and corporations."); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 382 (2000) ("We hold *Buckley* to be authority for comparable state regulation, which need not be pegged to *Buckley's* dollars.").

Although Congress may have an irresistible interest in our campaign finance practices, the Constitution's Elections Clause or the Tenth Amendment means Congressional authority stops where ours begins. Amici agree Elections Clause case law requires the States to yield or share many federal election functions with Congress, but decisions on who can contribute, what kind and amount of money can be used, and how candidates and parties can spend that money in state elections is a State's alone. This traditional and essential state power does not disappear because Congress has authority over federal elections, which are often held on the same day as state elections.

To be clear, we do not seek redress just for ourselves as political entities, but for the protection of our citizens who derive liberty from the diffusion of power. *Gillespie v. City of Indianapolis*, 185 F.3d 693, 703 (7th Cir. 1999) (quoting *New York v. United States*, 505 U.S. 144, 182-83 (1992) (O'Conner, J., for the Court) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting))).

Accordingly, amici will prove BCRA is an "ultra vires" Congressional action, see *Printz v. United States*, 521 U.S. 898, 923 (1997), by (**I**) discussing the threshold question[5] of Constitutional federalism and state elections, and (**II**) showing how Title I of BCRA takes power from the States.

I. THE CONSTITUTION LEAVES THE MANNER OF CONDUCTING STATE ELECTIONS TO THE STATES

The Elections Clause states:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. art. I, § 4, cl. 1.

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[5] Amici respectfully suggest the Court order the constitutional analysis in this case as was done in *Gillespie*, 185 F.3d 693: initially asking if the advocate can make a Tenth Amendment challenge; if yes, then deciding if that challenge is successful; if no, then proceeding to other claims such as Second or Fifth Amendment challenges. *See also New York*, 505 U.S. 144 (Tenth Amendment inquiry, then Guarantee Clause and Severability analysis); *Printz*, 521 U.S. 898 (Tenth Amendment inquiry, then Necessary and Proper Clause analysis); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (noting state's Tenth Amendment right to regulate its judiciary, then finding no Congressional intent under the Commerce Clause to change that, then finding no violation of the Equal Protection Clause); *Cf. Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (relying on *National League of Cities v. Usery*, 426 U.S. 833 (1976), looking at the Commerce Clause first, then the Tenth Amendment, then Just Compensation and Due Process Clauses of the Fifth Amendment).

That sentence is traditionally cited as the source of Congressional authority to regulate campaign finance. *Buckley*, 424 U.S. at 13. This Court has unanimously called this clause a "default provision; it invests the States with responsibility for the mechanics of *congressional* elections . . . so far as Congress declines to preempt [them]." *Foster v. Love*, 522 U.S. 67, 68 (1997) (internal citation omitted) (emphasis added). *See also, Storer v. Brown*, 415 U.S. 724, 729-30 (1974); *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972).

This clause has not, however, given Congress default power to regulate *state* elections. *See, e.g., Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986) (the Constitution allows for "state control over the election process for state offices"); *California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000) ("[S]tates have a major role to play in structuring and monitoring the election process. . . . "). This sentiment appears in majority opinions and dissents alike. *Jones*, 530 U.S. at 590 ("A State's power to determine how its officials are to be elected is a quintessential attribute of sovereignty.") (Stevens, J. joined by Ginsberg, J., dissenting).

The best analyses of the limited reach of the Elections Clause are made in *Oregon v. Mitchell*, 400 U.S. at 117-126 (controlling opinion of Black, J.); *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808-09 (1995); 2 Joseph Story, *Commentaries on the Constitution of the United States* 280-92 (1st ed. 1833); and *The Federalist No.* 59 (Alexander Hamilton). From each of those varied settings and centuries, one principle endures: the States, and not the federal government, have authority under the Elections Clause or the

Tenth Amendment[6] to regulate their own elections and perquisites for filling local public office.

This principle is supported by five points: (1) the founders' purpose in enumerating an election power for Congress was not to give it power to regulate state elections; (2) this Court's jurisprudence affirms States have broad regulatory rights over conducting state elections; (3) campaign finance laws are a fundamental manner of conducting an election; (4) a State does not yield its power because state and federal elections are often held on the same day; (5) arguments against the state interest are unpersuasive.

(1) The Founders Did Not Intend To Give Congress Power To Regulate State Elections

The Constitutional Convention debates make clear the Framers' Election Clause compromise was not intended to give Congress plenary power over federal and state elections, but rather to prevent States from over-regulating federal elections. *See* 2 Joseph Story, *Commentaries on the Constitution of the United States* 280-92, 284 (1st ed. 1833) (The concept of federal power regulating state elections is "so flagrant a violation of principle, as to require no comment."); *U.S. Term Limits*, 514 U.S. at 808-09 ("[T]he

[6] The question whether Congress has the affirmative power to regulate in a certain area is the "mirror image[ ]" of the question whether states have the reserved power to regulate in that area under the Tenth Amendment. *See, e.g., New York v. United States*, 505 U.S. at 156. If the Tenth Amendment is not a tautology, amici would view this case as a Congressional over-extension of a delegated power, rather than a pure Tenth Amendment inquiry, because the Constitution metes out election powers rather than being completely silent on the subject.

Framers' overriding concern was the potential for States' abuse of the power to set the 'Times, Places and Manner' of elections."); *The Federalist No.* 59, at 363 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that giving state governments exclusive power to regulate federal elections would leave the existence of the Union at the mercy of the States).

(2) States Have Broad Regulatory Rights Over Conducting State Elections

This Court's history is replete with endorsements of state power over state elections. *See, e.g., Sugarman*, 413 U.S. at 647 (State's power to regulate elections inheres in the State "the basic conception of a political community") (internal quotation omitted); *Pope v. Williams*, 193 U.S. 621, 632 (1904) ("[T]he privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution."); *Blitz v. United States*, 153 U.S. 308, 314-15 (1894) (The national government has "no concern" regarding certain fraud in the election of state offices.).

In *Oregon v. Mitchell*, 400 U.S. 112, this Court upheld a new voting age statute only as applied to federal, but not state, elections. Justice Black wrote:

> [n]o function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and *the nature of their own machinery for filling local public offices.*

Mitchell, 400 U.S. at 125 (emphasis added). Justice Black made an additional and compelling point in *Mitchell*: a State's plenary power over state elections is limited only by U.S. Constitutional Amendments, "each of which has assumed that the States had general supervisory power over state elections." *See id.* at 125-26.

(3) Campaign Finance Laws Are A Fundamental Manner Of Conducting An Election

There should be no doubt that state and federal campaign finance laws are a "traditional and essential function" of a democratically elected government. *See Pennsylvania Dep't of Corrections v. Yesky*, 524 U.S. 206, 209 (1998). Just as in determining the qualifications for state office holders, amici contend the manner of holding an election is a "decision of the most fundamental sort for a sovereign" and "at the heart of representative government." *Gregory*, 501 U.S. 452, 460, 463 (quoting *Bernal v. Fainter*, 467 U.S. 216, 221 (1984)); *accord City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732 n.5 (1995); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 565 n.17 (1994) (Souter, J., dissenting). Regulating the manner of an election is "comprehensive" authority including the power to impose "numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Foster*, 522 U.S. at 72 n.2 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

The Federal government's manner of regulating campaign finance is one traditional aspect of conducting a federal election. *Federal Election Comm'n v. Beaumont*, No. 02-403, 2003 U.S. LEXIS 4595, at *14 (U.S. June 16, 2003) (noting that since 1907, there has been a century of

Congressional attention to corporate political contributions). For Congress, enacting campaign finance laws is an essential government function too. Supporters contend the whole branch may fall victim to the appearance of corruption without new, stricter rules. If this Court agrees, then each State also faces this fundamental issue – *but for itself.*[7] *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985) (declining to review limitations placed on Congress' Commerce Clause powers by our federal system).

(4) A State Does Not Yield Its Power Because State And Federal Elections Are Held On The Same Day

The date of holding an election does not change a State's rights. Surely, when a State holds its elections simultaneously with the Federal government, Congress does not lose its power to regulate federal elections. But this does not mean Congress somehow gains the power to regulate state elections held on the same day.[8] *See Ex parte*

[7] Congress' purpose in enacting campaign finance reform (to orient Members away from donors and towards constituents) is precisely the reason Congress cannot regulate contributions to our state candidates and parties. *See Jones*, 530 U.S. at 580-81. Altering election laws for the purpose of changing candidates' views or whom they must "curry favor with" to get elected or reelected unconstitutionally occurs at the expense of a party's ability to perform the basic function of choosing their own leaders. *Id.* (citing *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973)). This is especially true when the goal is the "election of problem solvers *who are less beholden to party officials.*" *Id.* (emphasis in original).

[8] "Federal Election Day" under 2 U.S.C. §§ 1 and 7, means "the Tuesday after the first Monday in November in an even numbered year." *Foster*, 522 U.S. at 68.

Siebold, 100 U.S. 371, 393 (1879) (acts relating exclusively to the election of state and county officers are not amenable to Federal jurisdiction); *Oklahoma v. United States Civil Service Comm'n*, 330 U.S. 127, 143 (1947) (The United States "has no power to regulate[] local political activities as such."); *United States v. Reese*, 92 U.S. 214, 218 (1875) (noting with regard to the Elections Clause and municipal races, "the effect of art. 1, sect. 4, of the Constitution, in respect to elections for senators and representatives, is not now under consideration.").

The date of a state and federal election is a critical point because BCRA's hook for federalizing state fundraising rules is that nearly all elections for federal and statewide office are held on the same day.[9] Moving state elections to a different day or year to avoid BCRA's claw should not be suggested. As is, state elections are not violating anyone's constitutional rights. Nor are amici challenging Congress' exercise of its constitutional power over itself. We are just defending the exercise of our own. Saying that States can exercise their rights some other time does not sound as though we have "residuary and inviolable sovereignty" but more like we are Congress' prefecture. *The Federalist, No.* 39, at 245 (James Madison) (Clinton Rossiter ed., 1961); *Printz*, 521 U.S. at 919.[10]

[9] *See* BCRA, Pub. L. No. 107-155, tit. I, sec. 101, §§ 301(20)(A)(i), (ii), 116 Stat. 81, 85-86. Leon at 1213sa (fact #58); Kollar-Kotelly at 536sa (fact #1.39.1.2); Henderson at 298sa (fact #72c(2)(A)).

[10] States may wish to hold their elections simultaneously with those for the Federal government not just for convenience but for the reason Congress wanted a uniform federal election day: to remedy the evil arising from elections at different times that can distort the voting process and influence later voting. *Foster*, 522 U.S. at 73 (quoting *Ex*

(Continued on following page)

(5) Arguments Against The State Interest Are Unpersuasive

Although several States may write in favor of BCRA, the Constitutional power of Congress cannot be expanded by the "consent" of the governmental unit whose domain has been narrowed. *New York*, 505 U.S. at 182. Further, amici find the arguments of our sister states to be unconvincing. Below, they wrote: "because the Act is *designed* to regulate federal election activity, it does not intrude on purely local matters." Brief of Amici Curiae States of Iowa et al. at 13, *McConnell v. Federal Election Comm'n*, 2003 U.S. Dist. LEXIS 7834 (D.D.C. May 1, 2003) (No. 02-582) (emphasis added). With all due respect, that sounds more like an *ipse dixit* than a reasoned explanation, especially when those states also admit "some impact on those state elections and campaigns is inevitable." *Id.* at 11. That impact is not excusable just because BCRA was not *intended* to regulate state elections activity. *See Foster*, 522 U.S. at 73 (Resolving a conflict between state and federal election laws "does not depend on discerning the intent behind the federal statute."). Instead, it shows how positively well-integrated state and federal political activities are even with a dual set of governments.[11] And to the extent our sister states' arguments are policy-driven[12] we

parte Yarbrough, 110 U.S. 651, 661 (1884)); *Busbee v. Smith*, 549 F. Supp. 494, 524 (D.D.C. 1982) (recounting the purposes of § 7), *aff'd*, 459 U.S. 1166 (1983).

[11] Leon at 1221sa-1222sa (facts #90-92); Kolar-Kotelly at 525sa (fact #1.28); Henderson at 297sa (fact #71c).

[12] Policy arguments made below such as BCRA "is attacking the causes of cynicism," and "is an urgently needed national solution to a national problem," or BCRA will "counter the negative influence of fundraising" are all debatable, but not before the Court. Brief of Amici Curiae States of Iowa et al. at 3, 5, 8, *McConnell v. Federal Election*

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concede they have won that argument in the branch where it was properly fought. Today's question is whether that victory was constitutional.

BCRA's defenders may also claim it intrudes no more on state sovereignty than some other provisions of FECA, namely 2 U.S.C. § 441b forbidding "any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to *any* political office" (emphasis added) and 2 U.S.C. § 441e forbidding foreign nationals from making contributions "in connection with a Federal, State or local election."[13]

These provisions enjoy a stronger pedigree than BCRA. Sections 441b and e each find support in well-recognized Congressional powers other than the Elections Clause. With respect to § 441b, Congress has long held the ability to charter and regulate national banks. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819). Inherent in the grant of corporate life is the ability of the sovereign (in this case Congress, not a State) to constrain such institutions in the way its grantor sees fit. Section 441e is part of the Federal government's plenary power over immigration and foreign affairs rather than a specific

Comm'n, 2003 U.S. Dist. LEXIS 7834 (D.D.C. May 1, 2003) (No. 02-582).

[13] The FEC has previously interpreted "any political office" as applying to federal, state and local elections. *See United States v. Kanchanalak*, 192 F.3d 1037, 1049 (D.C. Cir. 1999). The Court has never had occasion to rule whether this FEC interpretation, § 441b or § 441e can withstand Tenth Amendment scrutiny. Amici note BCRA expanded 441e, but that change is not at issue in this case.

attempt to regulate elections. The predecessors to §§ 441b and e also predate any effort on the part of the Federal government to systematically regulate campaign contributions.[14]

This Court should note dual sovereignty is more than a barrier against a tide toward nationalism. It also allows healthy competition *among* the States. Amici know each State's individual success is based on enacting unique legislation in a variety of areas such as tax, employment law, and even the rules for financing state and local campaigns. Beyond being democracy's laboratory, a State may feel a contribution restriction (or lack thereof) may induce better candidates to run for governor who in turn, may have better chances of enticing new businesses or winning federal appropriations. Given that 68 of today's 100 U.S. Senators were previously elected to some state office,[15] our own state campaign finance laws must have been a fair proving ground for federal office.

We agree state sovereign interests are more properly protected by "procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Garcia*, 469 U.S. at 552. To amici it is obvious that federalism protects our sovereign interests in deciding who can contribute to those wishing

[14] 2 U.S.C. § 441b was originally part of the Tillman Act, ch. 420, 34 Stat. 864 (1907). 2 U.S.C. § 441e was originally enacted as 18 U.S.C. § 613 (1966), an amendment to the 1938 Foreign Agent Registration Act, 18 U.S.C. § 219.

[15] *See* 29 *Congressional Yellow Book* (Ericka J. Claflin ed., Leadership Directories, Inc. Summer 2003).

to run our governments, what support they can give, and how that money can be spent.

II. TITLE I OF BCRA TAKES A MANNER OF CONDUCTING STATE ELECTIONS AWAY FROM THE STATES

Title I of BCRA imposes new, nationally uniform rules that change the way amici have chosen to finance our election campaigns. Amici admit BCRA does not entirely replace state campaign laws,[16] but it does cross the line from federal into state territory by directly regulating state contributions, the voter contact work of state parties and even the commercials state candidates can run.

To prove this charge, amici will demonstrate: (1) the States have adopted a wide variety of campaign finance laws, (2) BCRA imposes federal rules on state activity, and (3) applying these rules fundamentally changes State choices on financing State election activity.

(1) States Have Adopted A Wide Variety Of Campaign Finance Laws

There are far more elections for state and local offices than federal offices.[17] To accommodate this, each of the 50

[16] Alleging a new election law's burden is not severe because "it does not limit the parties from engaging fully in *other* traditional party behavior, such as . . . conducting campaigns" is beside the point. *Jones*, 530 U.S. at 581 (emphasis in original). This Court has consistently refused to overlook an unconstitutional restriction simply because it leaves other constitutionally protected activity unimpaired. *See id.*

[17] Leon at 1223sa, 1227sa-1228sa (facts #97, 114); Kollar-Kotelly at 540sa (fact #1.43.2.3).

states, the four United States territories, and the District of Columbia has adopted its own unique campaign finance laws. *See* Federal Election Commission, *Campaign Finance Law 2000: Chart 2A: Contribution and Solicitation Limitations* ("FEC Chart 2A") *at* http://www.fec.gov/pages/cfl00chart2A.htm (last modified June 6, 2000). In many instances, these laws date to the late 19th century and have undergone a long and deliberative process of continual development and revision. *See, e.g.,* "Act to Prevent Corrupt Practices in Elections and to Provide for Publicity of Elections Expenses," Mass. Acts (1892); "Act to Promote the Purity of Elections," Cal. Stat. (1893).

According to the Federal Election Commission's most recent summary of state campaign finance laws, twenty-nine States permit and twenty-one States prohibit corporations from contributing treasury funds to state and local candidates' campaigns. *See* FEC Chart 2A. Of those States permitting corporate contributions, some allow unlimited contributions to be made, while others place limits. Many States also allow unlimited contributions of labor union treasury funds. In Michigan, unincorporated labor unions can make unlimited expenditures, but corporations may not. *See* Mich. Comp. Laws § 169.254 (2003). In Utah, the case is just the opposite. *See* Utah Code Ann. § 20A-11-1403 (Supp. 2002).

Some States allow individuals to make unlimited contributions to state candidates, political action committees ("PACs") and party committees. *See, e.g.,* Henderson at 290sa-291sa (fact #68b). Other States put a variety of limits on these gifts. Many States allow national, state and local political parties to spend unlimited sums on contributions to (or expenditures on behalf of) state candidates. Many states also allow unlimited transfers

from the national party committees to the state parties to finance state-related voter contact work.[18] Some States regulate the expenditure of these amounts.

Other peculiarities of state campaign finance laws include restrictions on contributions by certain regulated industries, prohibitions on contributions by lobbyists while the legislature is in session, regulations governing the operation of PACs, and provisions for public financing of state and local elections. *See* FEC Chart 2A. State election laws even vary the dates and years for holding state and local elections.[19]

Regardless, States are continually adjusting their campaign finance laws to reflect new priorities, enforcement concerns and changed conditions.[20] In many cases these changes are made by state legislatures and city councils. In some cases they are enacted directly by citizens through ballot initiatives and referenda. *See, e.g.,* California Proposition 34, *Campaign Contributions and Spending. Limits. Disclosure.* (2000); Leon at 1227sa (fact

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[18] Leon at 1239sa (facts #152-54); Kollar-Kotelly at 539sa (fact #1.43.2.1); Henderson at 297sa (fact #71c).

[19] Leon at 1213sa (fact #58); Kollar-Kotelly at 536sa (fact #1.39.1.2); Henderson at 298sa (fact #71c(2)(A)).

[20] Even as this brief was being written, it was reported that four states changed their state elections laws. *North Carolina State Board Finds Municipalities Barred From Making Contributions*, 2003 Money & Politics Rep. (BNA) (July 2, 2003); *Massachusetts Governor Lets Stand Repeal of Public Campaign Financing*, 2003 Money & Politics Rep. (BNA) (July 1, 2003); *Murkowski Signs Bill Loosening Limits on Contributions and Lobbyists in Alaska*, 2003 Money & Politics Rep. (BNA) (July 1, 2003); *South Carolina Governor Signs Bill To Beef Up Campaign Finance Rules*, 2003 Money & Politics Rep. (BNA) (June 30, 2003).

#111); Henderson at 310sa (fact #72); *Shrink Missouri*, 528 U.S. at 382.

(2) BCRA Imposes Federal Rules On State Activity

Before BRCA, federal election law could be easily summarized: contributions by individuals, PACs and parties were limited; contributions by corporations and labor unions were prohibited; and generic or mixed party activities[21] either did not count as a contribution or had to be paid with an allocation of federal and state-regulated money.[22] Leon at 1215sa (fact #65). But in any event, state activity by state candidates and parties was left alone.

Title I of BCRA changes that. The Title contains more than thirty new provisions and definitions which must be patiently read to appreciate their invasion of state sovereignty. Of particular concern to amici are the following

[21] Mixed expenses include the necessary (if not praiseworthy) efforts of political parties to identify voters, register them, and get them out to vote. Leon at 1195sa (fact #23); Kolar-Kotelly at 529sa (fact #1.31); Henderson at 292sa-294sa (facts #70-71); *Jones*, 530 U.S. at 587 ("Encouraging citizens to vote is a legitimate, indeed essential, state objective.") (Kennedy, J., concurring). Generic exhortations to "Vote Republican" require some accounting to ensure the party uses a mix of state and federal dollars to finance them. When the parties pay for communications such as "Vote for Congressman Smith" or "Defeat Attorney General Jones" they fully use federal or state funds and may be subject to contribution and some expenditure limits. *See Federal Election Comm'n v..Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*).

[22] *See, e.g.*, 2 U.S.C. §§ 441a(a)(1), 441a(a)(2), 441a(d), 441a(h), 441b(a), 431(8)(B)(ix), (x), (xi); 11 C.F.R. §§ 102.5, 106.

provisions which are unfortunately dense but fairly phrased as follows:

> § 323(a) NATIONAL POLITICAL PARTY COMMITTEES
>
> National political party committees may not solicit, receive, contribute, transfer or spend any funds not in accordance with Federal law.
>
> § 323(b)(1) STATE AND LOCAL POLITICAL PARTY COMMITTEES
>
> Any amount that is expended or disbursed for "Federal election activity" by a state or local committee of a political party shall be from funds subject to the limitations, prohibitions, and reporting requirements of Federal law.
>
> § 301(20)(A) THE TERM 'FEDERAL ELECTION ACTIVITY' MEANS
>
> (i) Voter registration activity for 120 days before a regularly scheduled Federal election;
>
> (ii) Voter identification, get-out-the-vote activity, or generic campaign activity conducted in an election where a candidate for federal office appears on the ballot (regardless of whether state candidates also appear on the ballot);
>
> (iii) A public communication that promotes, supports, attacks, or opposes a federal candidate for that office (regardless of whether the communication contains express advocacy or also refers to a state candidate); or

(iv) The cost of personnel who spend more than twenty-five percent of their compensated time on federal election activity.[23]

§ 323(b)(2) "LEVIN EXCEPTION" TO BCRA's APPLICABILITY TO STATE PARTIES

A state or local committee of a political party may use an FEC-approved allocation of extra funds for certain political party expenses provided that:

(i) The activity does not refer to a clearly identified federal candidate;

(ii) It is not for the cost of a broadcast communication (except if it just refers to a candidate for State office);

(iii) The extra money is from sources approved by State law, but no person may donate more than $10,000 for these expenses;

(iv) The amounts expended are raised by the state party itself and not from funds provided by the national political party or their officers, agents or related entities.

§ 323(f) STATE CANDIDATES

A candidate for state office or individual holding state office cannot make a broadcast communication described in (20)(A)(iii) (above) which

[23] "Federal election activity" does not include (i) communications solely about state candidates, (ii) contributions to state candidates, (iii) state conventions, or (iv) buttons, bumper stickers and signs depicting state candidates only. *See* BCRA, tit. 1, sec. 101, § 301(20)(B).

positively or negatively refers to a federal candidate unless he or she uses federal funds.

BCRA, Pub. L. No. 107-155, tit. I, sec. 101, §§ 323(b)(1), 323(b)(2), 301(20)(A), 323(f), 116 Stat. 81, 82-86 (codified at 2 U.S.C. §§ 441i, 431 (2003)).

From this glimpse, the Court can see these sections create quite a regulatory back-and-forth; there are three general rules, an exception, and then conditions on the exception. The first rule prohibits national parties from raising and transferring state-approved money to its state parties, and further prohibits them from making state-approved contributions to state candidates – *even if state law specifically permits it*.

The second rule prohibits state parties from spending state money on an incredibly misnamed set of "federal election activities." *See* Henderson at 318sa (fact #76). These so-called "federal" activities include: voter contact and generic party promotion conducted for an election with federal candidates *even if the activity does not mention a federal candidate*; and the not-so-bright line rule on prohibiting public communications that promote, support, attack or oppose someone who is a federal candidate *even without reference to an election*. BCRA, tit. I, sec. 101, § 301(20)(A).

The exception allows state parties to raise some extra money to be used for a share of routine voter contact work, *but* on the condition the money cannot be used to refer to a federal candidate, cannot exceed $10,000 per person regardless if state law permits more, and cannot be raised with the help of the national committee as done in the past. BCRA, tit. I, sec. 101, § 323(b)(2).

The last rule is of particular alarm to amici's state officials. BCRA requires any broadcast communication by

state candidates or officeholders that may also promote, support, attack or oppose an individual candidate for federal office be paid with federally-regulated, and not state, campaign funds. BCRA, tit. I, sec. 101, § 323(f).

(3) BCRA Fundamentally Changes State Choices On Financing State Election Activity

Applying BCRA to state activity makes for some treacherous ground. One misstep and a state party volunteer or candidate for city council could face a federal prison sentence.[24] That is true because most here-to-fore state party voter contact work is now "federal election activity." Henderson at 318sa (fact #76). This change means long-standing, uncontroversial state activities previously paid for with state money must now be paid for with federally-regulated funds. On its face, that is reason enough to invalidate Title I of BCRA. But applying BCRA produces irrational results that gives even more reason for it to be stopped at the state line. Examples:

Applying 323(a), the Republican National Committee may not raise money specifically allowable under the laws of Virginia, Kentucky, New Jersey, Louisiana or Mississippi and contribute that money to a state candidate in a manner approved by state law for elections occurring *this* November – even though there are no federal candidates on those ballots.[25]

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[24] BCRA, tit. III, sec. 312, 315 (codified at 2 U.S.C. §§ 437g).

[25] The evidence below shows the Republican National Committee spent over $15.6 million of state-regulated money on direct contributions to state and local candidates and other state party activities in

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Applying 323(a), the Republican National Committee can no longer work side-by-side with its fifty-five state-level parties to raise money for them in a manner approved by their state's law – even if the state party contributes every cent raised to state candidates.[26]

Applying 323(a)(1), Republican National Committee Co-Chairman Ann Wagner cannot organize and hold a series of state-regulated fundraisers for a nationwide slate of state and local female candidates in an effort to support the party platform of boosting diversity in government – even if the contributions go directly from the donors to the deserving candidates.[27]

Applying 301(20)(A)(ii), a state party may not use exclusively state funds to launch a get-out-the-vote drive because its incumbent governor is in a hotly contested election if a Congressional candidate is also on the ballot – even if that Congressman is running unopposed or is in an uncompetitive race.[28]

2001 – when there were no federal candidates on the ballot. Henderson at 298sa (fact #71c(2)(B)); Koller-Kotelly at 536-37sa (fact #1.39.1.2); Leon at 1213sa (fact #59).

[26] The evidence below shows the Republican National Committee spent $5.6 million of state-regulated money on direct contributions to state and local candidates in 2000. Henderson at 297sa (fact #72c(1)(A)); Leon at 1212sa (fact #55).

[27] This result runs contrary to Justice Kennedy's observation: "Our constitutional tradition is one in which our political parties and their candidates make common cause. . . . There is a practical identity of interests between parties and their candidates during an election." *Jones*, 530 U.S. at 584.

[28] *See* Leon at 1212sa-1213sa (fact #56) regarding the RNC financial assistance to California in 2002 and Indiana in 2000.

Applying 301(20)(A)(i), a state party is now prohibited from using state funds for voter registration efforts for a state primary election held as early as July before a general election – even if there are only state candidates on the primary ballot.[29]

Applying 301(20)(A)(ii), a state party is now prohibited from using any state money for a message stating "Vote Republican to Protect Your Water Rights" if a federal candidate is on the election ballot. The party's candidate for Water Commissioner, however, could use entirely state money for that very same message.

Applying 301(20)(A)(ii), a state party now faces a 365 day prohibition against using state funds for routine state voter contact work in an election year – even if it is not directed at a federal race or does not mention a federal candidate.[30]

Applying 301(20)(A)(ii), the state parties in the five states that have chosen to hold elections for state officers

[29] The Court's jurisprudence allows easy condemnation of BCRA's financial interference with state primaries. *See Jones*, 530 U.S. at 575 (citing *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1989)) ("[O]ur cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party selects a standard bearer . . . .") (internal quotations omitted).

[30] Prior federal law could not reach this sort of non-federal activity that "spilled over" into Congressional races or created "reverse coat tails." *Federal Election Comm'n v. GOPAC, Inc.*, 917 F. Supp. 851, 862, 865, 866 (D.D.C. 1996) (explaining while it is "theoretically possible" to isolate and trace the indirect impact GOPAC's non-federal activity had on Congressional elections, such activity is not federally regulable because GOPAC's activity did not directly support federal candidates).

in odd-numbered years can no longer receive state-law-approved transfers of money from the national parties – even if the money will only be spent on the state races.

Applying 323(b)(2) (the "Levin exception"), a state party can only raise certain money to pay its share of mixed state and federal voter contact work but no more than $10,000 can come from any one source – even if state law permits higher amounts.[31]

Applying 323(f) and the not-so-bright-line regulation of 301(20)(A)(iii), amici's office holders – whether in the context of their re-election campaigns or not – can no longer use state-regulated campaign funds for messages that refer to a federal candidate in a way that promotes or attacks that person for that office. Henderson at 292sa (fact #69).

This 323(f) prohibition deserves additional comment. Below, Judge Leon sustained this prohibition against state candidates and officeholders from making 301(20)(A)(iii) communications with state funds because it is "consistent with [his] preceding discussion of the constitutionality of Section 301(20)(A)(iii)" as imposed on political parties. Leon at 1146sa. To the extent this Court is reviewing his rationale, the judge is merging two very different things and is overlooking an extra element in 323(f).

[31] The evidence below shows this will substantially interfere, for example, with the California Democratic Party's state law-approved fundraising practices. *See* Leon at 1241sa (fact #161).

First, Judge Leon sustains the not-so-bright line of 301(20)(A)(iii) because the record reflects Congressmen know whose money is being given to the political parties for issue ads favorable to their re-election, which raises an appearance of corruption. Leon at 1130sa, 1134sa-1135sa. Second, political parties are unique and sophisticated: they are constantly in the business of electing their own, they merit special regulation and can avoid the bad words if they *really* want to advocate on an issue. Leon at 1139sa.

That may or may not be true, but 323(f) applies BCRA's speech prohibition to people, not party committees. They are people who may be running for the state legislature and think a campaign advertisement saying they are supporting the President's re-election will improve their own chances for getting elected. Instead, it will improve their chances for jail.[32]

More important, 323(f) also applies to individuals simply "holding" state or local office. BCRA, tit. I, sec. 101, § 323(f). Judge Leon overlooks the statute's extra prohibition on state office holders, *as officeholders*, regardless of whether they are seeking re-election or retiring. Congress cannot possibly have this power over our state office holders or prove even a minimal federal nexus for such a grant. "[S]imply because Congress may conclude a particular activity substantially affects [a Congressional power]

[32] It is possible the federal interest here is that a federal candidate could steer non-federal donors to a state candidate who agrees to run Trojan Horse ads really advocating the federal candidate's election. That fact is nowhere to be found in the approximately 1,400 pages below and should be dismissed, as this Court once aptly said, as "mere conjecture." *Shrink Missouri*, 528 U.S. at 392.

does not necessarily make it so." *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995) (*quoting Hodel*, 452 U.S. at 311 (Rhenquist, J., concurring)). Rather, it is a judicial question that can only be resolved by this Court. *Id.* (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring)).

BCRA is clumsy. BCRA is unreasonable. BCRA has commanderred state laws, state constitutions and state ballot initiatives upsetting "the usual constitutional battle of federal and state powers." *Gregory*, 501 U.S. at 460. The considered legal opinion of amici is BCRA creates real, concrete examples of federal interference with the States' prerogatives on how its governments will be chosen. This cannot be reconciled with the Constitution.

CONCLUSION

Federal money is admittedly a federal issue. State money is a state issue. State campaign finance laws are an integral part of state governance and this Court should not be surprised amici are here zealously guarding against this federal encroachment. *See, e.g., Alden v. Maine*, 527 U.S. 706, 748, 751-52, 758 (1999); *Printz*, 521 U.S. at 919-20.

Regardless of how this Court evaluates the merits of Congress' approach, the *first* question is whether Congress can have any approach that includes our state laws. After striking those sections that violate our sovereignty, we encourage the Court to *then* evaluate the justifications for the remainder.

The superfluity of Congress' approach to campaign finance reform may be the temporary tenor of the times. Fortunately, the judiciary can see beyond that. And while amici must frequently heed the desires of the federal government, this particular law is more deserving of fear than respect.

Title I of BCRA should be invalidated.

Respectfully submitted,

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